TRANSCRIBED FROM DIGITAL RECORDING

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

CUNG LE, et al.,	)	
	)	
Plaintiffs,	)	Case No. 2:15-cv-01045-RFB-PAL
	)	
vs.	)	Las Vegas, Nevada
	)	September 29, 2017
ZUFFA, LLC, d/b/a Ultimate Fighting Championship and UFC,	)	
	)	MOTION TO COMPEL
	)	
Defendants.		

TRANSCRIPT OF PROCEEDINGS

THE HONORABLE PEGGY A. LEEN,
UNITED STATES MAGISTRATE JUDGE

APPEARANCES: See Next Page

DIGITALLY RECORDED: Liberty Court Recorder (LCR)
9:31 a.m.

TRANSCRIBED BY: PATRICIA L. GANCI
(702) 385-0670

Proceedings recorded by electronic sound recording, transcript produced by mechanical stenography and computer.

TRANSCRIBED FROM DIGITAL RECORDING

APPEARANCES:

For the Plaintiffs:

DON SPRINGMEYER, ESQ.
WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP
3556 E. Russell Road, 2nd Floor
Las Vegas, Nevada 89120
(702)341-5200

JIAMIN CHEN, ESQ.
KEVIN RAYHILL, ESQ.
THE JOSEPH SAVERI LAW FIRM, INC.
555 Montgomery Street, Suite 1210
San Francisco, California 94111
(415)500-6800

For the Defendants:

PHILIP R. ERWIN, ESQ.
CAMPBELL & WILLIAMS
700 South 7th Street
Las Vegas, Nevada 89101
(702)382-5222

STACEY K. GRIGSBY, ESQ.
BOIES, SCHILLER & FLEXNER, LLP
1401 New York Avenue, NW
Washington, DC 20015
(202)237-2727

SUZANNE JAFFE NERO, ESQ.
BOIES, SCHILLER & FLEXNER, LLP
1999 Harrison Street, Suite 900
Oakland, California 94612
(510)874-1000

TRANSCRIBED FROM DIGITAL RECORDING

LAS VEGAS, NEVADA; THURSDAY, SEPTEMBER 28, 2017; 9:31 A.M.

--oOo--

P R O C E E D I N G S

THE COURT: Good morning. Please be seated.

COURTROOM ADMINISTRATOR: Your Honor, we are now calling the motion hearing in the matter of Le versus Zuffa, LLC. The case number is 2:15-cv-1045-RFB-PAL.

Beginning with plaintiffs' counsel, counsel, please state your names for the record.

MS. CHEN: Good morning, Your Honor. Jiamie Chen from the Joseph Saveri Law Firm on behalf of the plaintiffs.

MR. RAYHILL: Good morning. Kevin Rayhill from the Joseph Saveri Law Firm on behalf of plaintiffs.

MR. SPRINGMEYER: Good morning, Your Honor. Don Springmeyer of Wolf Rifkin for the plaintiffs.

MS. GRIGSBY: Good morning, Your Honor. Stacey Grigsby, Boies Schiller and Flexner, on behalf of Zuffa.

MS. NERO: Good morning, Your Honor. Susan Nero, Boies Schiller and Flexner, on behalf of Zuffa, LLC.

MR. ERWIN: Phil Erwin, Campbell and Williams, on behalf of Zuffa.

THE COURT: Thank you.

Mr. Miller, is my microphone on?

COURTROOM ADMINISTRATOR: Yes, Your Honor.

THE COURT: This is the time set for oral argument on

plaintiffs' emergency motion to compel production of documents withheld on privilege grounds. This has been a developing and emerging set of issues. I've previously conducted a limited in camera review of the Dana White documents and sustained Zuffa's claim of privilege with respect to the majority of those documents, compelling the ones identified in my order to be produced either in their entirety or redacted.

So, tell me where you are today and what, if any, progress you have made and what order you're seeking of the Court today.

Who will be arguing, counsel, for Zuffa's position? Excuse me. Counsel for plaintiffs. I beg your pardon.

MS. CHEN: Of course.

THE COURT: I'm a little under the weather and I -- so excuse me. I have a lozenge, and I'm trying to keep my throat moist.

MS. CHEN: Absolutely, Your Honor. Jiamie Chen for the plaintiffs will be arguing the plaintiffs' position.

THE COURT: Please.

MS. CHEN: Thank you. Would you like me to approach or argue from the table?

THE COURT: Wherever you're more comfortable.

MS. CHEN: Okay. Get a little bit closer.

Thank you, Your Honor. You know, I wanted to start out by addressing sort of the elephant in the room as in regard to

this particular motion. We completely recognize that waiver is a pretty extreme and draconian remedy, and we do not seek it lightly.

However, we do seek it because it's an extreme and draconian remedy for extreme and egregious cases, cases like this one. In fact, the Ninth Circuit and this particular court, the District of Nevada, have both ordered waiver in cases with facts that are less egregious than this particular case. And given the facts of this particular case, which I'll get into in a moment, it appears that waiver is really the only option here in terms of a meaningful remedy, a remedy that will make sense going forward with case progress.

So, let me start with essentially we are here today because of defendant's assertion of privilege over certain documents, and when they assert privilege over certain documents to withhold them, they bring upon themselves obligations, legal obligations, that are defined under Rule 26 and under Ninth Circuit law, particularly in the Burlington case.

We are here today because they have repeatedly failed and refused to meet those obligations, not by a little, not once, but repeatedly and by a lot. So let's start with the operative privilege log. The operative privilege log was produced to us on, I believe, July 11th. That would be 20 days before the close of a two-year discovery period.

The July 11th privilege log was substantially different

from the previous privilege logs in that -- and here's something that I really want to get into because I think this is pretty extreme and unique to this case.

In producing the operative privilege log, the defense reviewed a corpus of approximately 17,000 documents, and of those 17,000 documents, which represent a little more than half of the total number of documents they originally assert a privilege over, they found that over 12,000 of those documents were improperly withheld, Your Honor. That's 12,000 improperly-held documents out of approximately 17 --

THE COURT: Yes, but that was only after I had -- I had decided several motions outlining the scope of the dispute and why I believed certain privilege claims were not well taken by them.

MS. CHEN: Correct.

THE COURT: They modified their position as a result of the Court's order and basically threw in the towel with respect to those 12,000 documents.

MS. CHEN: Right. So what it showed was that the privilege logs it produced previously for -- at least for that 17,000 body of documents was more or less 65 percent overinclusive. And as a result, we were given a dump of 12,000 documents in a span of 10 days approximately three weeks before the close of discovery in this case. And that in and of itself renders this case more or less unique in terms of what happened

and all --

THE COURT: And what did you find when you reviewed those 12,000 documents?

MS. CHEN: We found hot documents, Your Honor. We found approximately 200 hot documents. And this is something I was going to get into, but I can address it now. We were actually -- and, again, we received these documents approximately 20 days before the close of discovery. We got on them right away. We were able to complete review of them by approximately the end of the July.

Now, the thing is by the end of July we had already virtually completed discovery. We'd taken the vast majority of depositions. Critically, we've had our experts prepare their reports with the body of documents we had, not including those 12,000 documents. But, nonetheless, because we sort of scrambled to get this reviewed and done and made use of, we were able to actually use some of those 200 hot documents from those 12,000 documents in the few remaining depositions that we had.

So getting back to the privilege log in this matter and what the defendants did and didn't do with regard to meeting their obligations, first of all, the privilege log is deficient in a number of ways. First, it is as we just discussed demonstrably inaccurate and overbroad in a substantial capacity. Secondly, it was untimely, and its untimeliness was distinctly prejudicial to the plaintiffs.

THE COURT: And when did the plaintiffs first raise the issue about the failure to produce a privileged document log?

MS. CHEN: They -- we engaged -- we began engaging in this dialogue after we received the first privileged log in April of 2007. And that's a good point to kind of harp on, Your Honor, because, you know, this -- the law is clear and undisputed in that when a party is seeking to withhold responsive documents in discovery, it is their burden and their obligation to provide --

THE COURT: There's no question about that, but now I'm here at this stage of the litigation and the plaintiff produced -- the plaintiffs produced their privileged document log, according to the declaration before me, on February 3rd, 2017. And it contained only 855 entries.

MS. CHEN: Correct.

THE COURT: And so on April the 7th, six weeks after you produced -- or April -- six weeks after approximately you produced your privileged document log, Zuffa produced its first privileged document log which contained 30,000 documents on it.

MS. CHEN: That's correct, Your Honor.

THE COURT: And that's when -- how soon after that did the parties initiate discussions about the adequacy of that 30,000-document log?

MS. CHEN: Almost immediately, Your Honor. I believe the exact communications are contained in the exhibits to our

motion, but I want to say within a week, something along those lines.

And I'm glad you brought up that, you know, sort of -- and this is a point defendants bring up about the fact that we filed our privilege log in February. They filed theirs in April. So on the face of it, it doesn't look like theirs is untimely because our is close in time, and I wanted to sort of draw the Court's attention to why that's not a persuasive argument.

The point of a privilege log is to enable you to -- is to inform the parties essentially seeking the production to provide information to those parties so that we can determine whether or not the assertion of privilege as to each document appears valid, correct.

We -- by the time they had produced their privilege log in April and we were able to review it, we had already completed the majority of our depositions at this point.

THE COURT: Correct, but what you haven't told me --

MS. CHEN: Yes.

THE COURT: You have told me that of the 12,000 documents you admittedly received very late in the discovery process and after a number of depositions were taken, 200 of those --

MS. CHEN: Correct.

THE COURT: -- were hot documents. And I take that to

mean significant and important to the litigation, things you would have liked to have known earlier.

MS. CHEN: Correct.

THE COURT: How, if at all, did those 200 documents affect how you otherwise would have proceeded had you had them earlier in time?

MS. CHEN: We would have -- we looked at those 200 documents. Those 200 documents, essentially the bulk of them, relates to six or eight individuals. These are six or eight individuals who -- whose depositions we have already taken at this point. And looking at these 200 hot documents, we may have asked different questions. We may have used them in a deposition. We may have --

THE COURT: Well, "may have" and absolutely, you know, there's this -- every once in a while you do get a smoking-gun document that changes the whole landscape of the case.

MS. CHEN: Trust me, we've looked for that. And we would love to have it.

THE COURT: And you didn't find one.

MS. CHEN: We actually found relevant documents, and I'm glad that Your Honor brought that up because I'm happy to show them to the Court.

So -- one moment, please.

Again, we found 200 hot documents. In the interest of not overburdening the Court, I'm going to provide the Court with

a sample of five of these documents and --

THE COURT: Make sure the other side knows which ones you're showing to me.

MS. CHEN: Yes, I will mark these as Plaintiffs' Exhibit 1, and I will give a copy to the defense as well.

Okay. And so what has just been passed to the defense and the Court as Plaintiffs' Exhibit 1, the cover page shows it is an excerpt of the privilege log, of Defense's privilege log, with the entries that match the documents that follow them. So the Court can see the very limited description and information that is provided us -- that was provided us with each one.

Now, calling the Court's attention to the document with Bates No. Zuffa -- ZFL 2706585. Again, this is a document that was originally withheld, but was later produced. In the document it states that it's an e-mail chain between individuals whose depositions we had already taken at that point. And I specifically want to direct the Court's attention to the bottom of the e-mail chain, the statement from Sean Shelby that he and Joe had -- Joe Silva have discussed bringing Spencer Fisher into WEC. That the -- that they now own the world at 135 and 145. Again, going back to Spencer Fisher, he states: He is at 26 and 26. To make this a possibility, I would need to get him five more fights, etc., but I need to keep the public perception of his pay at about 10,000 less on the show site. How can we make this work?

And then going up a few e-mails, Lawrence Epstein suggests: We can handle this easily. Let's just do a new agreement with a side letter.

And what that seems to indicate, Your Honor, is that Zuffa is actively trying to manipulate the public perception of how much the fighters are paid, trying to make it look like -- or I'm sorry -- the perception by other fighters of how much the fighters are paid to make it look like this particular fighter makes less than he actually does. And Lawrence Epstein suggested accomplishing that through a side letter which would pay this particular fighter $10,000 on the side that would not be visible to other fighters.

Now, this is clearly a key document in that it indicates the practice of Zuffa in manipulating the perception of fighter pay and hiding it in a side letter. And it involves individuals whose depositions we've taken. This is a document that we could easily have used in the depositions of Lawrence Epstein and others.

Would the Court like me to go through the rest of the documents as such?

THE COURT: You may if you wish. You need -- that's up to you.

MS. CHEN: Sure. The second of the five documents on -- in this sample list is ZFL 2704847. This has to do with sponsorship, and again if you look at the original privilege

entry, it only states that it's an e-mail chain discussing legal advice regarding fighter contracts which is a non-informative conclusory description.

Looking at the actual document itself, it shows Zuffa's essentially negotiating with sponsors and telling them that, Look, if you're going to sponsor UFC fighters, you can't sponsor any other fighter.

And they're saying that with regard to non -- I guess at this point non-UFC fighters; that if a sponsor wants to sponsor UFC fighters, they can only sponsor UFC fighters and they cannot sponsor non-UFC fighters or other MMA fighters that are non-UFC fighters. And, again, this is communications between individuals whose depositions we did in fact take in this case, Michael Mersch and others. And this is a document that we could have asked him about, but we weren't able to.

The third document in this case or in this excerpt is ZFL 2704608. This is a document that relates to one of our named plaintiffs, Jon Fitch. Now, the facts and circumstances surrounding this document indicate that around 2008-2009 Zuffa changed its merchandising policy, and it required fighters to now sign a Merchandising Rights Agreement. It appears that Jon Fitch originally refused to sign that agreement and Zuffa immediately terminated him. Fitch later relented and signed the merchandising agreement, and then Zuffa rescinded the termination letter. That's all sort of context that other

documents in this case have indicated.

This particular document is interesting in that it was in-between the recision of the termination letter and when Jon Fitch had originally refused to sign the Merchandising Rights Agreement. So in no uncertain terms UFC, Lawrence Epstein, is directing Zuffa to terminate Jon Fitch, and we believe it's because he refused to sign the merchandising rights letter. And, again, this is something that we could have used in our deposition of Lawrence Epstein and asked him about --

THE COURT: But this is also information in your client's knowledge.

MS. CHEN: Correct, but this -- I think when you show someone something that they said in the past that has been documented, it may lead to a different answer. But the point is we weren't able, we were prohibited from the opportunity to even consider that as a strategy in our deposition-taking because we didn't have these documents because they were still wrongfully withheld at that point. Excuse me.

The next exhibit is really short or, I'm sorry, the next document is short. It is ZFL 2704049. And it's again an e-mail with Lawrence Epstein and Jamie Pollack regarding a fighter named Gomi. And, again, this one has to do with signing with competitor video games; that the UFC was prohibiting, terminating, and/or punishing fighters for signing with rival video game companies.

In this e-mail Jamie Pollack tells everyone else on this e-mail that Gomi is close to signing with EA Sports, which is a competitor video game creator, for their video game. And he asks specifically: Would Gomi signing with a competitor prevent us from signing him to fight? And Lawrence Epstein responds: Definitely. Definitely. If he is going to license out his naming and imaging rights to a competitor, we are -- that would definitely prevent us from signing him.

And, again, this is something that we could have asked anyone on this e-mail chain about, but we were not able to because we didn't have this document.

And, finally, the fifth document, the fifth sample document is ZFL 2704614. Again, another e-mail chain. And this has to do with the practice of UFC to pressure fighters to resign and re-up their contracts before the last contract -- the last fight, the last bout, when their contract is up.

Previously we've determined that part -- at least part of the reason they do so is because, you know, if the fighter never hits the free market, then he's never able to find out sort of how much he's really worth on the free market if he's continuously under exclusive contract with the UFC.

So in this case or in this e-mail it's specifically with regard to a fighter -- let's see. It's specifically with regard to a particular fighter who turned down a fight apparently and wasn't injured. And the e-mail indicates that:

Look, we are going -- you know, either he's going to sign the agreement we offered him or he's done. He's not fighting anymore. And we'll put the heat on them tomorrow, essentially pressuring them to either sign it or not. And, you know, for turning down a fight, they did extend it -- their contract was automatically extended. So that provides further information and illustration of that particular UFC practice. And that is something that we could have asked Joe Silva, Lawrence Epstein, Tracy Hyman, anyone on this list of recipients and senders about.

And, again, this is another document that we could have used in depositions we in fact took, but we were not able to use it, did not know about it, because this document was wrongfully withheld at the time.

And, again, this is five out of approximately 200 hot documents that we found. And --

THE COURT: Presumably, they're the more significant or you wouldn't have -- would not have selected them as examples to the Court.

MS. CHEN: That's a fair statement, Your Honor. And at the same time I think it's also a fair statement to say that, you know, the 12,000 documents that the defendants voluntarily turned over are probably not the most significant and relevant of the documents that it continues to withhold. So that sort of assumption might go both ways.

So having just discussed how the un -- I'm sorry. To go back to kind of a previous point about us producing our privilege log in February versus them producing their privilege log in April, at the time we produced our privilege log in February, they hadn't taken any depositions of plaintiffs' witnesses except one. And they chose to take the deposition of Nate Quarry early in support of their motion for summary judgment with regard to him. Everyone else they hadn't yet deposed. So they were able to depose everyone else with the benefit of the information on our privilege log.

And what's also important to note is that they have never challenged a single entry on our privilege log as improperly withheld, and they have never challenged the sufficiency of the information on our privilege log with regard to any entry.

And to the extent that they argue our privilege log provides the same level of detail as theirs, that's comparing apples and oranges, Your Honor. And Your Honor's well familiar with the differences between the plaintiffs' side and the defendant's side to understand why. The plaintiffs are natural human beings. They hired outside attorneys specifically with regard to this litigation. And every entry on a privilege log is communications or documents that passed between human beings and their outside counsel that they retained specifically for this litigation.

On the other side the defense is a sophisticated corporate entity that has an in-house legal department and, excuse me, chose to install attorneys in senior positions within the corporate structure such that those attorneys routinely perform both business and legal functions. Therefore, they necessarily need to provide greater information so that you and I are able to determine whether each individual entry appears to be validly asserted as to privilege.

And I think now it's important to turn to the fact that, you know, the defense's obligations with regard to their privilege log and with regard to their assertions of privilege are not sort of murky. They have been well set out in an entire body of law with regard to privilege logs and their obligations. And for this particular case, however, I don't really think it's necessary to look beyond the Ninth Circuit Burlington case for two reasons. One, the Ninth Circuit sets out -- it enunciates a test in a way that is easily understandable and applicable to this case. And, two, the particular facts in Burlington that the Ninth Circuit explicitly considered and based its upholding of the waiver on, interestingly, are facts that are actually all present in this case.

So turning to Burlington, and again I won't belabor the point about the test that was enunciated in Burlington, I believe it's undisputed between us and the defense that the holistic reasonableness analysis that considers those four

factors that is laid out in Burlington is, in fact, the governing applicable test in this case.

So in discussing that, the Ninth Circuit found that to assess whether a party that is seeking to assert privilege and protect and withhold documents on that basis, you know, to assess whether or not they met their legal obligations with regard to asserting that privilege, there's four factors that have to be taken into account, right. And really briefly the four factors are the extent to which they -- I'm sorry -- the extent to which the objection or assertion of privilege enabled the litigant seeking discovery and the Court to evaluate whether each of the withheld documents is in fact privileged, the timeliness of the objection, the magnitude of the document production, and whether any particular circumstances of the litigation renders it unusually easy or unusually difficult.

All right. So those are the four factors that are to be considered on a case-specific basis. There's no -- in taking this position the Ninth Circuit is basically saying, Look, we're not going to say if you provide X, Y, and Z categories of information, then it's automatically sufficient, or if you only provide A, B, and C categories of information, it's automatically insufficient. The Ninth Circuit is saying it is a fact-specific wholistic reasonableness analysis and here is kind of the important considerations in that analysis.

If you apply that to this case, I think the first

factor the Ninth Circuit enunciates, and what is most likely the most important factor, the degree to which the information contained in the privilege log would allow you and I to assess whether the assertion of privilege is valid as to each entry. That's the most important factor, and that's the factor that really weighs most heavily in favor of insufficiency in this case.

If the Court will look at the privileged log excerpts that were included in the exhibits to the filings, the Court can see that the only descriptions the defendants have provided are conclusory and not informative. The defense essentially describes the content of each entry as containing legal advice. Your Honor, that's not informative. That's conclusory. Whether or not it contains legal advice is the conclusion we're trying to reach through the information they're supposed to provide. It's not -- it's -- it's a conclusory self-serving assertion.

THE COURT: So give me -- pull out an example and give me an example of what you think would be a sufficient description --

MS. CHEN: Absolutely.

THE COURT: -- that wouldn't -- without revealing the privilege itself.

MS. CHEN: Of course, Your Honor. And for the sake of comparison, Your Honor, I will also submit to the Court as well as to the defense what we believe to be a representative sample

of each of the three privilege logs that have been produced in this case so far. I'm going to mark them as Plaintiffs' Exhibit 2, 3, and 4. And I will also present a copy to the defense.

May I approach?

THE COURT: You may.

MS. CHEN: So 2, 3, and 4 are excerpts from the first, second, and third privilege logs that the defense has produced in this case. They are what we've considered to be representative because they are the first page, the last page, and a middle page of the privileged logs in the order the defense happened to produce it to us.

If the Court will call its attention to the description column, essentially that is the heart of what -- of the information that this is supposed to provide, right. And essentially the defense is asserting conclusorily that this -- that each document contains legal advice without --

THE COURT: Right. And what would you have them say? Let's pick the first one on Plaintiffs' Exhibit 2: E-Mail chain discussing legal advice regarding fighter contractors.

MS. CHEN: Sure.

THE COURT: What in your view would be an adequate description that would enable you to assess the validity of the assertion?

MS. CHEN: Absolutely, Your Honor. And I'm glad you asked that. Now, with regard to that particular entry, I can't

answer that because I don't have further information on the document, but what I'd like --

THE COURT: Precisely.

MS. CHEN: What I'd like to call the Court's attention to is Exhibit 7 to the -- to our motion. Exhibit 7 --

THE COURT: But you're not answering my question. All right. On its face there's a representation signed under penalty of Rule 26(g) that the e-mail chain discusses legal advice regarding fighter contractors.

MS. CHEN: Right, but --

THE COURT: And what additional information do you think would be required in order for them to meet their obligation to provide the specificity needed for you to evaluate? Because if it's true on its face, how is that not adequate?

MS. CHEN: That's a good question, Your Honor. And in order for us to determine whether or not that is an adequate assertion, Your Honor has determined in this case that not all assertions of, quote, unquote, legal advice in this case by the defense has been in fact legal advice. They have considered legal advice things like fighter contract negotiations, business determinations.

THE COURT: Correct. And that's what resulted in their producing an additional 12,000 documents when they saw that I did not favor the extent of the or the scope of the privilege

that they were asserting.

MS. CHEN: Correct.

THE COURT: And so then you got your 12,000 documents on the -- that were initially listed on the privilege log.

MS. CHEN: Correct.

THE COURT: And now what we have is what is left. And I'm really questioning you why what is left is not on its face an adequate description if it's truthful. I understand the inherent suspicion that zealous advocates have, but if it's truthful that it's legal advice regarding fighter contracts, why is that not a sufficient description?

MS. CHEN: We would like -- we think it would be adequate to provide more information in that, you know, it is considering, for example, the legal ramifications of a contract from -- proposed by the fighter's representative as opposed to, say, a business purpose. Zuffa's considering fighter negotiations and advice regarding Zuffa's business position and business goals. I think that's an important distinction to make simply because it has been so easy for the defense to conflate business function and legal function, particularly with regard to fighter contracts. I believe Your Honor authored a pretty detailed opinion already in distinguishing between the legal advice -- what would be considered legal advice and contractor -- in fighter contract negotiations and what is purely business function or primarily business function.

So to just simply call it legal advice with respect to fighter negotiations, it's not -- it's conclusory in its assertion that, you know, We're not going to give you information to find that this is or isn't legal advice. We're just going to tell you that this is legal advice.

So we would like -- you know, legal advice is legal opinion, legal analysis, something of that nature. And we would like to know what are you providing legal advice on. Is it something that would distinguish it from simply asserting legal advice over things that Your Honor has found is not legal advice with regard to contract negotiations? If that makes sense.

And kind of to my earlier point about, you know, what is sufficient versus what is not, the defense is actually -- they know very well what is deficient. And they know this because they've actually produced a very limited subset of supplemental descriptions that we have explicitly told them, you know, This is what we consider to be sufficient. We are in agreement that this is what we consider to be sufficient.

THE COURT: All right. So where you draw attention to specific entries on the log and requested supplementation they did supplement?

MS. CHEN: Correct. Correct.

THE COURT: And you found their supplementation adequate?

MS. CHEN: Correct. We found -- we found that the

supplementation that they provided is what would be adequate under Burlington and under Rule 26 in providing information that would allow us to determine whether or not it was a valid assertion of privilege. And those were attached as Exhibit 7 to our motion. And if Your Honor looks at them, you will see that they are substantively, fundamentally, and in nature different from the description Your Honor just read.

If Your Honor doesn't have it in front of you, I'm happy to read them or --

THE COURT: That's not necessary. I have read all of these exhibits. I don't have them memorized.

MS. CHEN: Sure. Absolutely.

THE COURT: But I have them before me tabbed and indexed.

MS. CHEN: All right. It is, again, Exhibit 7 to our motion. There is an e-mail communication and then there's an attachment. And I'm specifically referring to the attachment.

Okay. So in the attachment I'd like to point out two relevant columns, the description column which is towards the middle and the supplemental description column which is on the far right-hand side. The description column contains essentially the same type of conclusory limited descriptions that the defense has provided in each of its three privilege logs, and that is substantively conclusory and insufficient.

If you look at the supplemental description column,

that provides actual factual information. For example, you know, the first one -- the first supplemental description states: Outside counsel, Milbank, discussing IRS forms required by Asset Purchase Agreement. That's clearly a legal function. And in no way can you discern that from the description column of: E-mail chain providing legal advice regarding acquisitions. That is completely substantively different, fundamentally different. One is adequate. One is not. One is conclusory. One is informative.

So the fact that the defense has in fact provided these kind of supplemental descriptions shows that they are not only capable of providing sufficient information, but they actually understand the difference between what is sufficient information and what is not. They get it. They've done it. They just refuse to do it as to the rest of the privilege log for some reason and they haven't done it.

And I think that's significant here because the question of, you know, what we consider to be sufficient is shown right here by something that they authored and created and produced.

THE COURT: All right. I have a 10:30 criminal hearing, so I'm going to need to speed you up a little bit and give opposing counsel adequate time to respond.

MS. CHEN: Absolutely, Your Honor. So I want to close with this.

Again, waiver is an extreme remedy and I get that. We understand it. We don't seek it lightly. However, given the facts and circumstances of this case, it really is the only reasonable remedy that could possibly put us close to where we would be had the defense met their obligations.

The Ninth Circuit upheld -- it upheld a finding of waiver in a case that has strikingly similar facts to us in a case where the defendant substantially changed their privilege log after they produced it in which the defendant is a sophisticated corporate litigant and a repeat player in the kind of litigation -- in a case where -- I'm sorry. I don't have it in front of me.

Correct. Those are essentially the facts and circumstances the Ninth Circuit relied on to find that waiver was to be upheld. And these facts and circumstances are also present in this case, but even more so because -- because the descriptions in the privilege log are so deficient and they have been every single time.

Now, we're sitting here two months after the close of discovery. We're sitting here after we have completed essentially all of our discovery conducts, all of our depositions. We've prepared our witnesses or we've prepared our experts and the experts have prepared their reports with this body of documents that doesn't include the improperly withheld documents.

THE COURT: So what, if any, remedy are you asking, other than waiver and compel production of the entirety of the documents still withheld?

MS. CHEN: And that's a good question, and that's a question that Magistrate Judge Koppe actually specifically addressed in the Bullion case, essentially what are our other options here. And one possibly other option she considered was, you know, if the defense were to be given another chance to produce a privilege log that would be sufficient and then, you know, you and I can assess it. You can -- we can challenge the ones we think are insufficient --

THE COURT: By then all of the discovery had been completed.

MS. CHEN: Correct.

THE COURT: In that case it was produced days before the disclose -- the close of discovery. And there were 1,200 privileged documents; not 12,000.

MS. CHEN: Right.

THE COURT: And the total number of documents produced in the case was 30,000, and the defendants spent their time doing summary judgment motions instead of producing a privilege document log. And then Judge Koppe found that there was no possible way that all of the steps could be accomplished in the ordinary course in time for the defendants to meet the district judge's extended deadline for filing responses to the summary

judgment motions.

MS. CHEN: That is exactly true. And then in this case if we were to undertake something that's short of waiver, something like, Look, let's give the defense a fourth bite at the apple whereby you and I can then assess the privilege log and, you know, we can make challenges and we can review them and so forth, that's going to push this -- I mean, we're talking about, like you said, a --

THE COURT: But you're not asking me for that. You are not asking me to reopen any deposition. You're not saying there's any key documents that you've discovered that were wrongfully withheld, that you've been irreparably damaged, or that you haven't been able to respond to, or that you -- you now have them for your experts to consider if it alters their analysis. You're not telling me that anything you were produced -- that was produced of the 200 of the 12,000 that they produced, admittedly late in the case, changed the landscape, other than it would have been nice to have before you took the depositions that you took.

MS. CHEN: It would have -- I mean, because we didn't get them until literally the very end and we had already conducted all of discovery and formed our case strategy, it's kind of hard to say, Well, if we had this in the beginning, this is how it would be different because we have already gone so far.

THE COURT: Understood, but I'm asking you these questions in the course of conducting the wholistic evaluation I'm supposed to.

MS. CHEN: Absolutely.

THE COURT: I have been in cases in which after the close of discovery or after a key witness was taken we'd get a document in a plant explosion case that says, If we do this, which they denied they did, we're going to have a crater the size of a football field. Now, that altered what the witness had testified to and there were other remedies that were available, but we don't have that type of situation here. We have a situation in which you had massive document productions. You culled through 12,000 documents. 200 should have been produced to you and were significant to you.

And what you can't tell me is that they changed anything, changed any analysis, changed your expert reports, changed -- they directly contradict something specifically stated by a witness, were not available to respond to a dispositive motion, and that changed or that materially changed the outcome because I'm with you. These documents should have been produced. And I had to enter several written decisions in order to prompt the defendant in reevaluating its privilege assertions.

MS. CHEN: Sure. Absolutely, Your Honor. And, you know, with regard to the experts, the experts take many months

to come up with their reports and their analyses and their conclusions. And at the time that these documents had finally -- these 12,000 documents -- we had finally finished reviewing them and we were in a position where we can say, Hey, by the way, do you want to take a look at these and see if they change our analysis in any way, we were already -- I mean, the expert reports were already substantively done by that point, and we were already coming up on a deadline for filing these expert reports.

So we didn't -- I mean, I don't think we were really in a position to scramble and say, Wait. Let's go back to square one and see if this could have changed anything. I mean, the expert reports have already been filed in this case. In fact, the defense has already completed taking the depositions of our experts in this case based on the data that they had that didn't include these hot documents or any of these 12,000 documents.

THE COURT: All right.

MS. CHEN: So it's -- you know, it necessarily involves a degree of speculation to say whether or not the remainder of the withheld documents can or will or may change the direction of the case, but really the point, Your Honor, is that we -- because of the defense, we don't have a way to ever find out. We never had a way to substantively or meaningfully change or, I'm sorry, to substantively or meaningfully challenge any of their assertions as to privilege on these remaining documents

because the information they provided was so late and so --

THE COURT: All right. You're just repeating yourself because I've heard these arguments now very thoroughly discussed and let me hear from opposing counsel.

MS. CHEN: Thank you, Your Honor.

THE COURT: Ms. Grigsby.

MS. GRIGSBY: Good morning, Your Honor.

Let's just start by, let's say, the elephant in the room which is this Court has issued several rulings on privilege, and we have taken those to heart. And as a result, Zuffa began reevaluating its privileged withholdings well before we even had our first -- our in-person meet and confer with plaintiffs on June 20th, 2017, as reflected in the fact we noted in our paper it took 3,500 attorney hours for us to try to come up with some system so that we could re-review, in light of the Court's direction, what is privileged and what is not.

And as this Court is well aware, part of the complication is that some of the primary custodians were the legal department itself, three attorneys, and a paralegal who did quite a bit of correspondence and did what they would characterize as legal review as we've noted in Mr. Epstein's deposition of many, many of the contracts.

The problem here, however, after this re-review we produced 12,000 documents. All of which were produced except for a handful dealing with financial documents by July 10th,

2017. And all of which were produced before the second depositions of Mr. Hendrick, Mr. Mersch, Mr. Epstein, and the White deposition.

So the question really is -- and I think the problem here is not really the privilege log, but it's that plaintiffs are trying to change the rules of the game and rewrite the facts.

So opposing counsel handed up a list of exhibits. We did a fact check on these exhibits to see when were they -- when they were produced and whether they could have been used in depositions. The first document, this Bates stamp ZFL 2706585, was actually produced, a different version of it, on July 20th, 2016. It was a year before all of the depositions, prior to Ms. Long's deposition. The reason it got reproduced is because we noted that we had produced it before and that it was not privileged. It was just a mistaken withholding.

The second one was produced before June 30th, 2016. The third video game exhibit, which is ZFL 2704608, was actually produced in March of 2017 and, therefore, Mr. -- Mr. Epstein could have -- a different version was produced in full. Mr. Epstein could have been asked about this document.

And this fourth exhibit, ZFL 2704049, was produced again before -- by June 30th, 2017. Mr. Epstein had a deposition on July 21st of 2017. He could have been asked during that time, and Mr. White's deposition didn't take place

until August 2017.

And, again, this Exhibit 5, ZFL 2704614, it's really talking about an extension. It was produced by June 30th, 2017. You could have -- plaintiffs could have asked Mr. Epstein. But, furthermore, just to say the idea that Zuffa has used extensions to somehow keep the fighters under control, we vigorously dispute it. But they have used other similar documents in their depositions, and it's been one of the plaintiffs' theories of the case from the very beginning.

And just to address the issue of the expert reports, and as this Court is well aware, their expert reports were due on August 31st, 2017. So all of the documents they're pointing out right now were produced over two months before their expert reports were due.

So, here, they're trying to change the facts, but they're not just trying to change the facts. I think they're trying to change the rules because we believe this dispute is moot. Again, as we said, we did a re-review based on this Court's guidance, and as you saw, we did an in camera submission to show how we had been determining privilege. We engaged in extensive negotiations. We did several meet and confers with plaintiffs starting in April of 2017 on how to resolve the remaining issues with the privilege log. And in fact, as noted in the plaintiffs' original motion and in our opposition, we actually had an in-person meet and confer on June 20th, 2017; in

which we informed them that we plan to re-review the areas, the targeted areas, that they had pointed out. We agreed that we would produce them later in correspondence on June 24th, 2017, by July 10th, 2017. And we told plaintiffs that we would provide similar descriptions for the re-reviewed entries to what we had done earlier with acquisitions that they pointed out. Plaintiffs' counsel said in person this was not -- that they couldn't have asked for anything more. Those were his precise words.

Now that we've re-reviewed these and produced 12,000 documents, plaintiffs are asking for something different. So they're trying to change the agreement.

And, literally, they are trying to change the requirements of Rule 26(b)(5), which does not create a bright line, in order to advance their privilege dispute. Even putting aside the fact that the parties have this agreement, they have little basis to claim that the revised log doesn't meet the requirements of 26(b)(5). I think we've noted this in our opposition, but our descriptions are substantially similar to those that plaintiffs have on their privilege log.

And, yet, they ask for a waiver --

THE COURT: Well, they tell me that there's a qualitative difference in their privilege log because of the nature of the communications that involve individuals and communications with outside counsel as opposed to a corporate

structure that uses lawyers in dual capacities.

MS. GRIGSBY: I mean, they're saying that because they're saying for the purposes of assessing -- I guess in the very broad sense of (b)(5) it's harder for them to assess because we have many, many lawyers, but that doesn't change the requirements of the rule which is generally you write the sender, the recipient, the general nature of the communication. And where plaintiffs have asked for more information, as they did in the meet-and-confer process on June 20th, 2017, we agreed to provide it to them.

So, I mean, again, I think it's really, really important to look at the Advisory Committee note which is on (b)(5). When this section was added to the rules, and as I'm sure this Court is aware, the Advisory Committee in 1893 says: The rule does not attempt to define for each case what information must be provided when a party asserts a claim or privilege or work product protection. Details concerning time, persons, general subject matter, etc., may be appropriate if only a few items are withheld, but may be unduly burdensome when voluminous documents are claimed to be privileged or protected, particularly if the items can be described by categories.

I mean, this is what the Advisory Committee contemplates. Yes, it means to be substantially harder, but on the other hand, it is incredibly burdensome. I mean, Your Honor, we took a substantial amount of resources in order to try

to address issues with the privilege log, making sure that we were faithful to this Court's order. It was not a small undertaking. And now the plaintiffs merely want more because, again, they have this sense that there are items marked on the privilege log when the items they've shown you today they've already seen and they saw before the deposition. And many items -- and I'm not going to -- I know this Court is in a hurry -- are really of very little significance.

For example, the fact that they can point to 200 hot documents out of 17,200 shows that many of these are just not significant. There were lists of communications between associate general counsel and a paralegal which merely say: Is this contract okay? Is this okay to review?

We've decided to withhold our claims of privilege because it's not worth the effort to get the declarations for every single one or to fight over it, but, I mean, every single one is arguably --

THE COURT: And I understand your arguments in that regard, and I have looked at your privilege log and the revised privilege log. The one issue that I have is with respect to the entries on the July 11th privilege log that include a third party as a recipient or a sender.

MS. GRIGSBY: So for the recipient or sender, for example, for Bonnie Worth, Bonnie Worth is actually an agent, was acting literally as an agent for Zuffa. So that is our

basis to withhold based on privilege. And I'll also note that plaintiffs withheld communicate -- claimed privilege over communications between lawyers and agents on their own privilege log.

We would be happy to provide supplemental information even to this Court on those particular instances and those particular individuals and why we claimed privilege. But, again, this blanket argument that somehow our log is deficient even after plaintiffs have made an agreement, we've lived up to our end of the bargain, at this point seems unfair. And, in fact, I would --

THE COURT: You're talking about the agreement to narrow the category of documents on the privileged log that they were most interested in, which is what you did.

MS. GRIGSBY: We did, and we also revised descriptions for those categories. So we actually did go through, which is why it took so many man hours, and attempted to revise the descriptions to give them the information that they said they thought was deficient and they couldn't ask for more.

But, I mean, here again, you know, if this Court is inclined, we can have notes with respect to the third parties, but it just seems significant that --

THE COURT: No, you're representing to me as an officer of the court that the third parties that you're referring to for which documents were withheld on the basis of privilege were

appropriately withheld because they involve individuals with whom you have a good faith basis to believe they were acting as agents and, therefore, covered by the privilege notwithstanding that they were not part of your organization.

MS. GRIGSBY: Correct, Your Honor. I personally reviewed the agreement between the entities. So there was an agency agreement, at least with respect to Bonnie Worth and several others that plaintiffs had raised. We actually did conduct that assessment. It was not -- we did not lightly take their claim that we were adding third parties to destroy the privilege.

So generally, again, I think Your Honor understands the issues, understands the facts. I'm willing to respond to more questions, but I would like to keep this brief. But just to say, I mean, from our standpoint this really is an abuse of the discovery process. In fact -- the fact that the parties have worked together, reached an agreement, and then a month later they filed a motion to compel, and even after we've produced the documents, changed our descriptions, have continued to take the resources of both the parties to pursue this motion -- and, in fact, just to note, their reply brief still points out errors, but they had to correct their reply brief because initially they --

THE COURT: They said twice that you refused to meet and confer. I saw that.

MS. GRIGSBY: And, in fact, there was correspondence that the same day offered to meet -- on Friday offered to meet and confer on Monday and Tuesday, but also they said that Kirk Hendrick was on several of the communications before he was chief legal officer. That was because he was general counsel of the company at that time. He was -- he had gone from general counsel to COO solely to chief legal officer, but he was actually general counsel.

I mean, this is an abuse of the discovery process, to continue on and to kind of change the facts in order to pursue this dispute and use the resources of the parties. And with that, we'd just respectfully request that this Court deny the plaintiffs' motion to compel.

THE COURT: Ms. Chen, you can have exactly two minutes for brief rebuttal.

MS. CHEN: Thank you, Your Honor.

I think for the defense to get up here and tell you that we are the ones abusing the discovery process is quite rich given the facts and circumstances of this case. We're not the ones that produced --

THE COURT: She does have a point about you negotiated an agreement about the documents you were most interested in and got those agreements and -- got those documents and got the revised description of the documents you were most interested in, and now you're swinging for the fences on the rest of it.

MS. CHEN: So it's -- her representation that they lived up to their end of the agreement I believe is incorrect. The agreement that we had was that they would re-review those filed -- those 17,000 documents, which they did, and then subsequently changed the descriptions on the entries such that we were able to get the information we need to know whether or not we want to challenge. They didn't do that. Your Honor, if you look at the sampling of the July 11th log versus the April 7th log and the April 24th log, they are substantively the same. They may have added a few words, but the words that matter, just the conclusory assertion that this is legal advice without the information that we need, that didn't change.

And, again, if you look at the descriptions in the July 11th log, they look nothing like the descriptions in Exhibit 7 which we agreed, again this was part of the agreement that she referred to, we agreed that they would provide that kind of information in the privilege log because that is the information that is legally sufficient under Rule 26 and Burlington. They didn't do that. They didn't do that in the July 11th log. Instead, they gave us 12,000 documents 20 days before the close of discovery that we weren't able to meaningfully use at that point; because even though they gave it to us on June 30th, we weren't able to review 12,000 documents until the very end of July. And at that point we had already finished mostly preparing for the few depositions that we had left. Our expert

reports were substantively completed. They were submitted on August 31st. The experts aren't going to go back to square one on August 1st when they've been working on this for months and months and months.

So really to say that, you know, you didn't really do a whole lot with what we gave you is looking at the argument backwards. We could not do a whole lot with it because we thought --

THE COURT: But you don't address the fact of the five examples that you just gave me --

MS. CHEN: Yes.

THE COURT: -- Ms. Grigsby just told me that every one of those were produced either earlier or in other productions or in another iteration.

MS. CHEN: The documents, I don't believe each and every one was previously produced. I believe some were in fact produced for the first time on June 30th. And to the extent that previous versions --

THE COURT: She told me that two of them were -- oh, three of them were.

MS. CHEN: Right. And to the extent that previous versions were produced, Your Honor, those versions were redacted partially or in regard to the important parts of the document. So the fact that they were produced doesn't mean that they were produced in a meaningful usable way.

Thank you.

THE COURT: Thank you.

Well, I have carefully reviewed and considered the moving and responsive papers and put this in the context of a very lengthy litigation and a series of disputes, including a number of disputes resulting in written orders and decisions on the scope of the privilege that has been claimed and the issues as they pertain to this case. And I am satisfied that the defendants have with the revised privilege log and in connection with the agreements of the parties negotiated in connection with the issues in this case satisfied their obligations. And I'm particularly impressed with the in camera review of the Dana White documents which everyone acknowledges is a -- one of the central key figures involved in this case.

Of the documents that I ordered and submitted for in camera review on a random basis, the defense privilege was sustained on the overwhelming majority of the documents, and I found that less than 10 percent of the documents withheld should be produced, a couple in their entirety and several were appropriately redacted.

And so having satisfied myself that defense counsel did an excellent job under the circumstances -- I've conducted document reviews. And you can have 10 associates or 10 partners review 100,000 documents a piece, and you'll have disagreement among them about what should be produced, what's responsive,

what is appropriately privileged, what is not. On balance, I find that given the entire history of this case, the magnitude of the document production, the way the parties have worked through their disputes that the motion to compel should be denied. And that's the order.

Thank you.

MS. GRIGSBY: Thank you, Your Honor.

(Whereupon the proceedings concluded at 10:29:33 a.m.)

--oOo--

I, Patricia L. Ganci, court-approved transcriber, certify that the foregoing is a correct transcript transcribed from the official electronic sound recording of the proceedings in the above-entitled matter.

/s/ PATRICIA L. GANCI
Patricia L. Ganci

October 4, 2017
Date